Neutral Citation Number: [2022] EAT 202

Case No: EA-2020-001049-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 November 2022

Before :

HER HONOUR JUDGE TUCKER

- -

Between :

MR W BALCERZAK **Appellant**

- and -

(1) **GEORGE BIRCHALL SERVICE LIMITED**
(2) SECRETARY OF STATE FOR BUSINESS AND ENERGY & INDUSTRIAL STRATEGY **Respondents**

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James McHugh (instructed by Simpson Millar LLP) for the **Appellant**
The Respondent did not attend and was not represented

Hearing date: 2 November 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Tribunal had clearly made an error in rejecting a claim on the basis that the EC Certificate number provided, and that on the Certificate were not the same. They were.

HER HONOUR JUDGE TUCKER:

1. In this case, the Appellants, whom I will refer to as the Claimants, as they appear before the Tribunal, issued a claim for a protective award after having been dismissed by reason for redundancy on or around 20 March 2019.

2. The first respondent went into administration on 28 March 2019.

3. The Claimants' case is that no consultation took place prior to redundancies being declared or taking place for the purposes of section 188 of the Trade Union Labour Relations (Consolidation) Act 1992.

4. On 22 July 2019 administrators sent to the Claimants the following information: first, that the contracts of employment of the Claimants were terminated by reason of redundancy due to the company entering administration; secondly, that there were no elections of any committees for the purposes of statutory redundancy; thirdly, that the administrators did not object to the continuation of the Tribunal proceedings in respect of an application for a protective award.

5. Prior to the Claimants issuing proceedings in August 2019, they completed ACAS Early Conciliation, as they are required to do. They received a reference number from ACAS. They issued their claim.

6. On 6 November 2020, some 15 months after the claim had been issued in August 2019, the Claimants received notice of a Rejection of their claims, the reason being stated that the name of the prospective Respondent on the Early Conciliation Certificate was not the same as the name on the Claim Form.

7. The Claimants lodged an appeal on 17 December 2020. They sought to advance two grounds of appeal. Both were allowed to proceed to this full hearing. Both Respondents have notified the EAT that they have no submissions to make at this hearing and nothing to add to that set out before the EAT.

8. The two grounds of appeal are, first, that the Tribunal simply made a mistake and that there was, in fact, no discrepancy between the name of the Respondent on the EC certificate and the ET1.

9. However, because there were some initial difficulties obtaining a copy of that Certificate the Claimants also advanced an alternative, second ground of appeal, which is that there is if there were any discrepancy between the names, the Tribunal erred because, having regard to the discretion granted to the tribunal under Rule 12 of the Employment Tribunal Rules of Procedure 2013, the Tribunal failed to consider whether or not it would amount to an injustice to reject the claim.

10. The Claimants asserted that it was an error not to exercise the discretion to accept the Claim given the following:

a. First, the concession made by the administrators on behalf of the Respondents and the high likelihood of the Claimants seeking to advance a substantive claim with a high likelihood of success;
b. Secondly, the fact that the rejection of the claim would deprive the Claimants of a remedy which they would otherwise be legally entitled to and yet have no other recourse to obtain the same;
c. Thirdly, because the timing of the rejection meant that the Claimants now would be substantially out of time to resubmit any rectified claim.

It was submitted that the Claimants were innocent with regards to any of the delay which has

occurred in respect of the rejection of the claim.

11. Today I have heard brief oral submissions on behalf of the Claimants, and I have read the Skeleton Argument submitted on their behalf. I have been able to see both a copy of the EC certificate and the Claim Form issued before the Tribunal. It is clear, in my judgment, from looking at those documents that the name of the prospective respondent on both of those is set out as follows: George Birchall Service Limited. There appears, on the documents before me, to be absolutely no difference between the names of the Respondents on both of those documents. I therefore allow the appeal because I consider that it is evident in this case that an error appears to have been made because the name of the respondent on the ET1 and on the EC certificate was identical.

12. Given the amendments which have been made to Rule 12 of the ET Rules of Procedure, it is good practice, in my judgment, that when Employment Judges consider a claim and compliance with the early conciliation provisions, that they maintain within their mind a 'checklist' of both the need to check, first, whether there are any discrepancies between that set out in the Claim Form and which appears on the EC Certificate but, also, the question of what that error is and whether, in the light of that error, it is appropriate to reject the claim and whether it would be in the interests of justice to do so.

13. To that extent, I agree with the tenor of the points made by Mr Sheldon KC, sitting as a Deputy Judge of the High Court, as he then was, and set out in paragraphs 17 to 18 of the decision in **Stiopu v Loughran**, **EA-2019-000752-BA**:

> **"17. … before rejecting the claim on the basis that "the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation certificate relates" (Regulation 12(1)(f) of Schedule 1 to the 2013 Regulations) the employment judge should also have considered whether the claimant had "made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim" (per Regulation 12(2A)). It appears**

> **from the short decision letter that this was not done. If it was done then the employment judge did not explain her reasoning.**
>
> **18. In my judgment, rule 12(2A) is a "rescue provision" designed to prevent claims from being rejected for technical failures to use the correct name of the respondent (or the claimant) in the early conciliation certificate and the ET1. The wording of rule 12(2A) is that the claim shall be rejected if the judge considers that the claim is of a kind described in subparagraph (f):**
> **"… unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim."**
>
> **In my judgment, this language requires the employment judge in every case to ask him or herself the question as to whether there is a "minor error" in relation to a name or address and whether it would or would not "be in the interests of justice to reject the claim". These questions are part and parcel of the overall rule at 12(2A)".**

14. Therefore, I allow the appeal on ground 1 but in principle consider that the points made by the Claimants in respect of ground 2 were well made.